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PROCEDURE FOR JUDICIAL REVIEW OF CERTAIN ADMINISTRATIVE AGENCY ACTION

SEPTEMBER 22, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 800]

The Committee on the Judiciary, to whom was referred the bill (S. 800) to amend chapter 7, title 5, United States Code, with respect to procedure for judicial review of certain administrative agency action, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

The bill would also eliminate the requirement of the $10,000 jurisdictional amount in federal question cases, that is, actions arising under the Constitution, laws or treaties of the United States, where the action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Further, the bill would simplify technical complexities concerning the naming of the party defendant in actions challenging Federal administrative action by amending section 703 of title 5, to permit the plaintiff to name the United States, the agency or the appropriate officer as defendant. This will eliminate technical problems arising from plaintiff's failure to name the proper Government officer as defendant.

Finally, the bill amends section 1391(e) of title 28, U.S.C., to provide that, in actions against the United States, its agencies, or officers or employees in their official capacities, additional persons may be joined in accordance with the Federal Rules of Civil Procedures and

with other venue requirements which would be applicable if the United States, its agencies or one of its officers or employees were not a party.

STATEMENT

The Justice Department in its comments to the Senate committee on this bill indicated that it favors its enactment in the form in which it passed the Senate. This bill is also supported by the Administrative Conference of the United States.

The bill S. 800 contains a series of amendments to titles 5 and 28 of the United States Code which have been endorsed by the American Bar Association and by the Administrative Conference of the United States. The bill would first amend section 702 of title 5 of the United States Code. That section currently provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereunder. S. 800 would not alter this provision; it would add to it. In so doing the bill would provide for abolishment of the defense of sovereign immunity in certain actions against the United States. More specifically, it would add to section 702 a provision that an action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. It would also provide that the United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

In considering these recommended additions, it is important to note that the amended section 702 would specifically provide that it would not affect other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground. Further, section 702 clearly would specify that it does not confer authority to grant relief if any other statute granting consent to suit expressly or impliedly forbids the relief which is sought.

This bill would also amend section 703 of title 5 of the United States Code to remove the current uncertainty as to who may be named as a defendant when the United States is sued. Specifically, the sentence to be added to section 703 would provide that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

The bill S. 800 also provides two amendments to title 28 of the United States Code. Section 2 of the bill would amend section 1331 to eliminate the current requirement that there be a $10,000 amount in controversy in order to establish the jurisdiction of a federal court over federal questions. The amendment provides that whenever a federal question is litigated in an action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity, federal courts would have jurisdiction without regard to the amount in controversy.

Section 3 would amend section 1391(e) of title 28 to permit joinder of third parties in litigation in which the Federal government is a defendant.

The purpose of this bill is best summarized by stating that it would remove three technical barriers to the consideration on the merits of citizens' complaints against the Federal Government, its agencies or employees. The amendment made to section 702 of title 5 would eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency. The amendment to section 702 would not affect other limitations on judicial review—such as that the plaintiff lacks standing to challenge the agency action, that the action is not ripe for review, or that the action is committed to unreviewable agency discretion. Similarly, the amendment would not confer authority to grant relief where another statute provides a form of relief which is expressly or impliedly exclusive. The amendment to section 702 is meant to eliminate only the doctrine of sovereign immunity as a bar to naming the United States. It is not addressed to the issue of proper parties defendant. That is treated in the second sentence added to section 703 by the bill.

As has been noted, section 1 of the bill would also amend section 703 of title 5, United States Code, by the addition of a new second sentence which would permit the plaintiff in actions for nonstatutory review of administrative action to name the United States, the agency, or the appropriate officer as defendant. This is intended to eliminate technical problems arising from a plaintiff's failure to name the proper Government officer as a defendant. The first clause of the new sentence is intended to preserve specific provisions regarding the naming of parties which have been or may in the future be established by Congress. Such provisions may be part of a fully developed review procedure or may be provisions which are even more narrowly directed only to the required naming of a particular defendant where such requirement has intended consequences such as the restriction of venue or service of process. An example of the latter is 16 U.S.C. 831c(b), which displays an intent that litigation involving actions of the Tennessee Valley Authority be brought against that agency only in its own name. See *National Resources Council* v. *Tennessee Valley Authority*, 459 F. 2d 255 (2d Cir. 1972).

Another problem which may arise in actions for judicial review of administrative action is that the right asserted cannot be valued in dollars and cents. Section 2 of the bill meets this problem by amending section 1331 (a) of title 28 by adding an exception to the requirement that there be at least $10,000 in controversy, so that when the action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity, the establishment of any such sum or value would not be required.

As has been indicated, the bill would remedy certain other technical problems concerning the naming of the United States, its agencies, or employees as parties defendant in actions challenging Federal administrative action, and also relating to the joinder of appropriate non-Federal parties.

Background of the Bill

The bill S. 800 implements Recommendations 68–7, 69–1 and 70–1 of the Administrative Conference of the United States,[1] and the texts of the recommendations of the Conference are set out at the end of this report. This bill, and the companion House bill, H.R. 10199, are also supported by a wide range of organizations and agencies, including the American Bar Association,[2] the Federal Bar Association,[3] the Environmental Defense Fund,[4] the Judicial Conference of the United States,[5] and the Department of Justice.[6]

The bill H.R. 10199 was the subject of a subcommittee hearing before this committee's Subcommittee on Administrative Law and Governmental Relations on December 4, 1975 at which representatives of the Administrative Conference of the United States and the American Bar Association testified in support of the bill.[7] Hearings were held S. 800 in the Senate by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on April 28 and May 3, 1976.[8] On May 10, 1976 the Department of Justice submitted its written views on the bill S. 800 to the Senate committee. The Department supports the bill in the form passed by the Senate.[9]

A. SOVEREIGN IMMUNITY

Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act of 1946, 28 U.S.C. section 1346(b).[10] S. 800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus. Since S. 800 would be limited only to actions of this type for specific relief, the recovery of money damages contained in

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[1] *See* exhibit A, below, for text of the Conference recommendations.

[2] *See* statements of William Warfield Ross, Esq. and Francis M. Gregory, Jr., Esq., American Bar Association, in Hearings before the Subcommittee on Administrative Practice and Procedure on "Bills to Amend the Administrative Procedure Act," April 28, May 3, 1976, 94th Cong., 2d sess. (1976) (hereinafter cited as "1976 Hearings"). Also see statements of the same witnesses in Hearing Serial No. 29 of the House Judiciary Committee Subcommittee on Administrative Law and Governmental Relations, Dec. 4, 1975.

[3] *See* statement of Donald A. Rago, Esq., Federal Bar Association, 1976 Hearings.

[4] *See* statement of Jacqueline Warren, Esq., Environmental Defense Fund, 1976 Hearings.

[5] *See* letter from William E. Foley, Deputy Director, Administrative Office of the United States Courts, Nov. 3, 1970, exhibit B, below (hereinafter cited as "Foley letter"), supporting earlier version of bill, S. 3568.

[6] *See* letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, May 10, 1976, exhibit C, below (hereinafter cited as "Scalia letter").

[7] House Committee on the Judiciary Hearing, Serial No. 29.

[8] Senate 1976 Hearings supra.

[9] Department of Justice letter of May 10, 1976.

[10] At the state level, the trend has also been toward the reduction or elimination of the sovereign immunity defense. For example, 21 states and the District of Columbia have by judicial decision overturned, in varying degrees, the sovereign immunity defense to tort actions. (Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Pennsylvania, Rhode Island, West Virginia, and Wisconsin.) Approximately ten other states (Connecticut, Delaware, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Washington and Wyoming) have constitutional provisions which enable the legislature to prescribe the manner and venue in which a suit against the sovereign may be brought. The jurisdictions of Iowa, New York, Oregon, and Utah have ended by statute the sovereign immunity defense to tort actions. Furthermore, the state of Montana has completely abrogated the doctrine by constitutional amendment. For further discussion, see Hjort. *The Passing of Sovereign Immunity in Montana: The King is Dead!* 34 Montana L. Rev. 283 (1973); Comment, *To Catch the Elusive Conscience of the King: The Status of the Doctrine of Sovereign Immunity in Alabama,* 26 Alabama L. Rev. 463 (1974).

the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected.

Courts can make a useful contribution to the administration of Government by reviewing the legality of official conduct which adversely affects private persons. The acceptance of judicial review is reflected not only in court decisions but in the many statutes in which Congress has provided a special procedure for reviewing particular administrative activity. For years almost every regulatory statute enacted by Congress has contained provisions authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens.

Unfortunately, these special statutes do not cover many of the functions performed by the older executive departments, such as the Departments of State, Defense, Treasury, Justice, Interior ,and Agriculture. In addition, there are omissions and gaps in the application of special review statutes. In these instances, judicial review is available, if at all, through actions involving matters which arise "under the Constitution, Laws, or treaties of the United States" as provided in section 1331(a) of title 28. These actions are referred to as "nonstatutory review" actions and jurisdiction for these review procedures is in United States district courts.

These actions usually take the form of a suit for injunctive, declaratory or mandamus relief against a named Federal officer on the theory he is exceeding his legal authority. In theory such actions are against the officer and not against the Government for whom he is acting and is a legal fiction developed by the courts to mitigate the injustice caused by strict application of the sovereign immunity doctrine. At the Senate hearings Richard K. Berg, executive secretary of the Administrative Conference of the United States, noted:

> * * * if this action were logical, easy to apply and did substantial justice, perhaps there would be no problem. But it does not. On the contrary, it has set lawyers and courts to chasing conceptual will-o'-the-wisps.[11]

there is no specific statute authorizing judicial review, the suit is dismissed on the basis of sovereign immunity.

Dean Roger Cramton of Cornell Law School, a former chairman of the Administrative Conference and Assistant Attorney General and a leading scholar on sovereign immunity, has described the effect of these wispy fictions on the judicial process:

The problem is that judges who are not familiar with the history of the fiction and its purpose attempt to make determinations whether the suit is actually directed at the Government rather than the named defendant. This practice in turn raises a number of complex questions involving the relationship between the official and his employer—the Government. If it is found that the Government is the actual defendant, and there is no specific statute authorizing judicial review, the suit is dismissed on the basis of sovereign immunity.

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[11] 1976 Hearings, testimony of Richard K. Berg.

leading scholar on sovereign immunity, has described the effect of these wispy fictions on the judicial process:

> The basic problem with the sovereign immunity doctrine is that it has developed by fits and starts through the series of fictions. The resulting patchwork is an intricate, complex and not altogether logical body of law. The basic issue—balancing the public interest in preventing undue judicial interference with ongoing governmental programs against the desire to provide judicial review to individuals claiming that Government has harmed or threatens to harm them—is obscured rather than assisted by the doctrine of sovereign immunity in its present form.[12]

Representing the Department of Justice, which supports S. 800, Assistant Attorney General Antonin Scalia wrote:

> No one can read the significant Supreme Court cases on sovereign immunity, from *United States* v. *Lee*, 106 U.S. 196 (1882) to *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), *Dugan* v. *Rank*, 372 U.S. 609 (1963) and *Hawaii* v. *Gordon*, 373 U.S. 57 (1963) (per curiam), without concluding that the field is a mass of confusion; and if he ventures beyond that to attempt some reconciliation of the courts of appeals decisions, he will find confusion compounded. Accepting the elimination of the doctrine of sovereign immunity is not, then, a case of exchanging the certain for the uncertain, or the known for the unknown.[13]

The Senate report referred to a number of cases which illustrate the problem referred to by Mr. Scalia. It was pointed out that the doctrinal confusion caused by sovereign immunity has been highlighted in recent courts of appeals decisions. In *Schlafly* v. *Volpe*, 495 F.2d 273 (7th Cir. 1974), the court described sovereign immunity as:

> one of the more ill-defined aspects of federal jurisdiction. Perhaps the only irrefutable statement that can be made regarding this doctrine is that it appears to offer something for everyone.[14]

The court then reviewed the leading Supreme Court cases and pertinent courts of appeals decisions in reversing in part a district court dismissal of a suit challenging the legality of suspended Federal highway funding. The court held that the Federal Government had waived sovereign immunity and, in any event, the ultra vires exception to the doctrine rendered it inapplicable.

Writing of the doctrine's exceptions, the *Schlafly* court noted:

> In anticipation of the government's cry that the sovereign cannot be sued without consent, complaints are drawn with a covetous eye on the doctrine's 'exceptions,' only to be confronted with assertions that the facts present an 'exception to the exception,' or 'qualify' the exceptions, or that enter-

[12] Report of the Committee on Judicial Review of the Administration Conference of the United States, 1 *Recommendations and Reports of the Administrative Conference* 191, 194 (1969) (hereinafter cited as "ACUS Reports").
[13] Scalia letter, exhibit C, below.
[14] 495 F.2d at p. 277.

> tainment of the plaintiff's claim would create an 'intolerable burden on governmental functions, requiring use of the doctrine despite its otherwise applicable exceptions.' [15]

In *Littell* v. *Morton*, 445 F.2d 1207 (1971), the Court of Appeals for the Fourth Circuit reversed a district court dismissal of a suit on sovereign immunity grounds. The suit by an attorney for an Indian tribe sought review of the Secretary of the Interior's action in disallowing his claim for compensation for services. The court's opinion frankly recognized the problems in applying sovereign immunity:

> It must be recognized at the outset that an effort to establish logical consistency in the decisions dealing with sovereign immunity is bound to be frustrating. The authorities are not reconcilable, and there are conceptual conflicts in the various holdings with which an intermediate appellate court must grapple. Our task is magnified because we have been unable to find any case in which the Supreme Court has sought to reconcile the notion of sovereign immunity with the fundamental concept of the APA that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness.[16]

As Judge MacKinnon noted in *Know Hill Tenants Council* v. *Washington*, 448 F.2d 1045 (D.C. Cir. 1971):

> The result of course is a condition of hopeless confusion in judicial opinions, and an invitation to Government attorneys to assert the applicability of the doctrine whenever the opportunity reasonably presents itself. A federal trial court is faced with a thankless task whenever it is called upon to decide whether the doctrine is applicable in a particular case.[17]

The doctrinal confusion is such that the courts are divided on the fundamental questiton of whether or not sovereign immunity bars actions for equitable relief. For example, in *American Federation of Government Employees, Local 1858* v. *Callaway*, 398 F. Supp. 176 (N.D. Ala. 1975), the court said:

> It is a well-recognized principle that the doctrine of sovereign immunity bars suits against government agencies or officials for monetary damages, but does not bar suits for injunctive or declaratory relief.[18]

On the other hand, in *Penn* v. *Schlesinger*, 490 F.2d 700 (5th Cir. 1974) reversed on other grounds 497 F.2d 970 (5th Cir. 1974) the court held that:

> A declaratory judgment (against the sovereign), if equivalent to a claim for injunctive relief, would be * * * barred by the doctrine of sovereign immunity.[19]

One area where misunderstanding of the sovereign immunity doctrine has perpetuated considerable confusion and injustice is that of

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[15] 495 F.2d at p. 277 (citations omitted).
[16] 445 F.2d at pp. 1211–12.
[17] 448 F.2d at p. 1059.
[18] 398 F. Supp. at p. 191.
[19] 490 F.2d at p. 704.

employment discrimination or discharge suits against Federal officers. Reviewing these cases, one commentator noted that:

> Several federal courts of appeals, covering states where federal employment discrimination is greatest, have held that sovereign immunity prevented them from banning employment discrimination by federal officials, [thus ignoring or misapplying the recognized exception to the doctrine of ultra vires or unconstitutional action by Federal officers.] [20]

Based on the testimony presented to this committee and to the Senate committee, it appears that the consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity.[21] Professor Cramton summarizes this when he notes that "the application of the doctrine of sovereign immunity to actions challenging the legality of Federal conduct is totally erratic, haphazard, unpredictable, unfair, inconsistent, and, in some situations, unjust." [22] To Professor Kenneth Culp Davis, enactment of S. 800 is "urgent" in order to remove "the unnecessary injustice caused by sovereign immunity." [23]

The application of sovereign immunity is illogical and one cannot predict in what case the injustice is likely to occur. The Senate report observed that more probably than not, an average person with a less experienced attorney will be thrown out of court by the sovereign immunity doctrine while the wealthy corporation with expensive, experienced counsel will be able to sidestep the doctrine. The fact remains that the injustice of sovereign immunity may occur in any case, with respect to any form of government conduct, unless there is a specific statute allowing judicial review.

Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable—and intended by Congress—that a court would uphold a claim of sovereign immunity, involved disputed title to real property.[24] The results in these cases were so obviously unjust that in 1972 with the enactment of legislation also considered and reported by this committee,[25] Congress enacted legislation to permit actions to quiet title to be brought against the United States. 28 U.S.C. sections 1346(f), 1402(d), 2409(a).[26]

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[20] Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 Harvard Civ. Rights-Civ. Lib. L. Rev., pp. 322, 326–27, 367 (1975). See also *Bramblett* v. *Desobry*, 490 F.2d 405 (6th Cir. 1974) (suit by discharged employee of non-appropriated fund activity against commanding officer, alleging "arbitrary," "capricious," and "unconstitutional" action, dismissed because "the United States, as sovereign, is immune").

[21] *See e.g.*, K. C. Davis, Administrative Law Treatise ch. 27 (1958, Supp. 1965); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L.Rev. 389 (1970); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich.L.Rev. 867 (1970); Currie, *The Federal Courts and the American Law Institute* (pt. II), 36 U.Chi.L. Rev. 268 (1969); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv.L.Rev. 1479 (1962); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J.Pub.L. 1 (1960); Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 Harvard Civ. Rights-Civ. Lib.L.Rev. 322 (1975).

[22] 1970 Hearings at p. 46.

[23] Letter from Kenneth Culp Davis, to Senator Edward M. Kennedy, Apr. 12, 1976, 1976 Hearings (hereinafter cited as "Davis letter").

[24] *See Malone* v. *Bowdoin*, 369 U.S. 643 (1962); *Gardner* v. *Harris*, 391 F.2d 885 (5th Cir. 1968).

[25] Public Law No. 92–562, 92d Cong., 2d sess.

[26] The Senate Committee on Interior and Insular Affairs commented on the sovereign immunity doctrine in its report on this legislation:

Because of the common law doctrine of "sovereign immunity," the United States cannot now be sued in a land title action without giving its express consent. Grave inequity often

Just as there is little reason why the United States as a landowner should be treated any differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.

The importance of ameliorating the effect of the sovereign immunity doctrine in other areas besides quiet title actions is emphasized by the number and variety of cases in which the defense is still raised. The committee has been advised that the doctrine has been invoked in hundreds of cases each year concerning agricultural regulations, governmental employment, tax investigations, postal-rate matters, administration of labor legislation, control of subversive activities, food and drug regulation, and administration of Federal grant-in-aid programs.[27]

In each instance, the sovereign immunity doctrine diverts the court's attention from the basic issue concerning the availability or scope of judicial review. Sovereign immunity beclouds the real issue whether a particular governmental activity should be subject to judicial review, and, if so, what form of relief is appropriate. Its elimination as proposed in S. 800, in the words of Richard K. Berg, executive secretary, Administrative Conference, "would be a major step in rationalizing the law of judicial review of agency action. It might not change many outcomes, but it would force the courts to ask and to answer the right questions." [28] Where S. 800 would change the outcome of a suit, the committee believes that the result would be justified. For, as Senator Kennedy observed at the Senate hearings:

> A review of the cases—as confused as they are—reveals one certain conclusion: where sovereign immunity has been held to be a bar to suit, and where no other defenses * * * would have been applicable, unjust or irrational decisions have resulted.[29]

The committee does not believe that the partial elimination of sovereign immunity, as a barrier to nonstatutory review of Federal administrative action, will create undue interference with administrative action. Rather, it will be a safety-valve to ensure greater fairness and accountability in the administrative machinery of the Government.

Other methods found in the substantial and growing body of law governing availability, timing, and scope of judicial review provide a much more rational basis for controlling unnecessary judicial interference in administrative decisions than does the defense of sovereign immunity. Thus, a case is unreviewable if it involves actions "committed to agency discretion by law." Other defenses include (1) statutory preclusion; (2) lack of ripeness; (3) failure to exhaust administrative remedies; and (4) lack of standing. The availability of these defenses—all of which provide a sounder substantive basis

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has resulted to private citizens who are thereby excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs. * * * [T]he committee believes this principle is not appropriate where the courts are established, not for the convenience of the sovereign, but to serve the people.
S. Rept. 92-575, 92d Cong., 1st sess., at p. 1.

[27] *See* 1970 Hearings; authorities cited at note 22, *supra*.

[28] 1976 Senate Hearings, testimony of Richard K. Berg.

[29] 1970 Hearings at p. 3.

to control court review on the merits than the confusing doctrine of sovereign immunity—indicates that the policy against indiscriminate judicial interference with Government action would not be abandoned by eliminating the defense of sovereign immunity.

Further the modification of sovereign immunity will not overwhelm Federal courts and government lawyers with a flood of litigation. Apparently, the Judicial Conference of the United States shares this view, since it has endorsed identical legislation in the past.[30]

Since the application of sovereign immunity is unpredictable it seldom deters the bringing of a suit though it may affect the result or induce an error which requires correction at the appellate level. As a practical matter, the usual economic costs of bringing suit and the defenses cited above will operate to prevent inundation of the courts.[31]

Also, any increase in litigation on the merits is likely to be offset by a decrease in litigation on the question of sovereign immunity. Presently, sovereign immunity is raised as an additional, complex issue in litigation which requires considerable judicial time and effort to resolve or circumvent. When the issue is the basis of decision in the first instance, it invites appeals and further litigation on the matter.[32] The elimination of the vexing and difficult preliminary question of sovereign immunity in a large number of cases would probably provide a net savings of time and money to the Federal Government even if a few more cases did proceed to a determination on the merits of the legality of Federal administrative action.

However, even if there is a slight increase in caseload, the time has finally come when the injustice and inconsistency resulting from the unpredictable application of the sovereign immunity doctrine should be remedied.

As Government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of Government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law. The enactment of section one of S. 800 –the partial elimination of the sovereign immunity defense in actions for equitable relief—is an important step toward this goal.

Amendmnet of 5 U.S.C. Section 702

The portion of S. 800 that modifies the doctrine of sovereign immunity adds three new sentences to the existing language of 5 U.S.C. section 702, which deals with the right to judicial review of Federal administrative action.[33]

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[30] Foley letter, exhibit B, below.
[31] *See* 1976 Hearings, testimony of Ralph Nader, Public Citizen, Inc.
[32] *See* 1970 Senate Hearings at p. 54.
[33] Some Federal courts of appeals have held that 5 U.S.C. section 702 (1970) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.") constitutes a general waiver of sovereign immunity in actions seeking judicial review of Federal administrative action. *See, e.g., Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F.2d 663, 668 (2d Cir. 1973); *Scanwell Laboratories* v. *Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *Estrada* v. *Ahrens*, 296 F.2d 690 (5th Cir. 1961). *But cf. Coslon* v. *Hickel*, 428 F.2d 1046 (5th Cir. 1970). In clear conflict, however, five other circuits have held that the APA does not constitute a waiver of sovereign immunity. *See Curus* v. *United States*, 226 F.2d 416 (1st Cir. 1955); *Littell* v. *Morton*, 445 F.2d 1207 (4th Cir. 1971); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *State of Washington* v. *Udall*, 417 F.2d 1310 (9th Cir. 1969); *Motah* v. *United States*, 402 F.2d 1 (10th Cir. 1968). The Supreme Court has yet to resolve the circuit conflict regarding the impact of section 702 of the APA on the

The first of the additional sentences provides that claims challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgment, mandatory relief, etc.). Thus, limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected. The consent to suit is also limited to claims in courts of the United States; hence, the United States remains immune from suit in state courts.

Since the amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of "agency" in 5 U.S.C. section 701. Section 701(b)(1) defines "agency" very broadly as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" except for a list of exempt agencies or functions: Congress, Federal courts, governments of territories or of the District of Columbia, mediation boards, courts-martial and certain other military, wartime and emergency functions.

The proposed amendment will also not affect the operation of the rule that review is not available "to the extent that * * * statutes preclude review * * * or * * * agency action is committed to agency discretion by law." 5 U.S.C. section 701(a). The case law concerning these two categories of review is thus untouched by the proposed amendment. The amendment *would* apply to bar the assertion of sovereign immunity and force the court to articulate the true rationale for a decision not to grant relief.

Effect on the United States

Actions challenging official conduct are intrinsically against the United States and are now treated as such for all practical purposes. Thus, for example, the defense of Federal administrative action is conducted by the Department of Justice or, in some cases, by agency counsel. The second new sentence of section 702 allows the plaintiff to name the United States as a defendant in such actions and permits the entering of a decree against the United States.

At the request of the Department of Justice, the Senate amended the bill to provide "that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title) and their successors in office, personally responsible for compliance." This will assure clear definition of the particular individuals who will be per-

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sovereign immunity doctrine. For general discussion, see *Littell* v. *Morton*, 445 F.2d 1207, 1212 (4th Cir. 1971); *Schlafly* v. *Volpe*, 495 F.2d 273, 280–82 (7th Cir. 1974).

On this problem Professor Davis notes that:

"As a matter of history, Congress clearly did not attend the APA to waive sovereign immunity. But judges of federal courts of appeals have such a strong sense of justice that five courts of appeals have held that the APA constitutes a waiver of sovereign immunity. I can imagine that all the judges who have so held are somewhat uncomfortable in so holding, but their choice is between treating plaintiffs unjustly or straining the historical materials. Congress should relieve our good judges from such an unnecessary dilemma.

". . . The case law as a whole is somewhat complex and confused. Congress should simplify and clarify it by amending the APA in accordance with the [sovereign immunity] proposal of the Administrative Conference and the American Bar Association." Davis letter, 1976 Hearings.

sonally responsible for compliance with the court decree. The new sentence would read:

> The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States, provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

As has been stated previously in this report, this provision is meant to eliminate only the doctrine of sovereign immunity as a bar to naming the United States. It is not addressed to the issue of proper parties defendant, which is treated in the second sentence of section 703 of title 5 as added by this bill.

Law Other Than Sovereign Immunity Unchanged

S. 800 is not intended to affect or change defenses other than sovereign immunity. All other than the law of sovereign immunity remain unchanged. This intent is made clear by clause (1) of the third new sentence added to section 702:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.

These grounds include, but are not limited to, the following: (1) extraordinary relief should not be granted because of the hardship to the defendant or to the public ("balancing the equities") or because the plaintiff has an adequate remedy at law; (2) action committed to agency discretion; (3) express or implied preclusion of judicial review; (4) standing; (5) ripeness; (6) failure to exhaust administrative remedies; and (7) an exclusive alternative remedy.

Special doctrines favoring the United States as a litigant, such as the inapplicability of statutes of limitations to claims asserted by the United States, are unaffected. Statutory or rule provisions denying authority for injunctive relief (*e.g.*, the Anti-Injunction Act, 26 U.S.C. section 7421, and 28 U.S.C. section 2201, prohibiting injunctive and declaratory relief against collection of federal taxes) and other matters (*e.g.*, Rule 13(d), dealing with counterclaims against the United States) also remain unchanged. It should be noted in particular that 5 U.S.C. section 701(a) is unchanged and remains applicable.

Other Exclusive Remedies or Statutory Limitations

Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act.[34] Congress created a damage remedy for contract claims with jurisdiction limited

[34] February 24, 1855, 10 Stat. 612.

to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.[35]

The language of clause (2) of the proviso directs attention to particular statutes and the decisions interpreting them. If a statute "grants consent to suit" with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive.

Clause (2) of the proviso does not withdraw specific relief in any situation in which it is now available. It merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy to be the exclusive remedy.

Clause (2) of the proviso, at the request of the Department of Justice,[36] has been amended to read as follows:

> Nothing herein * * * (2) confers authority to grant relief if any other statute that grants consent to suit [for money damages] *expressly or impliedly* forbids the relief which is sought. (Emphasis added.)

This language makes clear that the committee's intent to preclude other remedies will be followed with respect to all statutes which grant consent to suit and prescribe particular remedies. The proviso as amended also emphasizes that the requisite intent can be implied as well as expressed.

B. JURISDICTIONAL AMOUNT

The amount in controversy requirement in subsection (a) of section 1331 of title 28 prevents an otherwise competent United States district court from hearing certain cases seeking "non-statutory" review of Federal administrative action. These cases "arise under" the Federal Constitution or Federal statutes, and the committee believes they are appropriate matters for the exercise of Federal judicial power regardless of the monetary amount involved.

The purpose behind the amount-in-controversy requirement was to reduce case congestion in the Federal courts by setting a figure "not so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies."[37]

Yet Congress has substantially lessened the importance of the amount-in-controversy requirement with respect to section 1331 by passing many statutes that confer Federal question jurisdiction with-

[35] *See, e.g.*, The Anti-Injunction Act. 26 U.S.C. section 7421, prohibiting suit "for the purpose of restricting the assessment or collection of any tax * * *" *Cf. Bob Jones University* v. *Simon, et al.*, 416 U.S. 725 (1974) (action to enjoin revocation of letter ruling declaring qualification for tax-exempt status held to be within and barred by the Act).

[36] *See* Scalia letter, exhibit C, below.

[37] S. Rept. 1830, 85th Cong., 2d sess., pp. 3099, 3101 (1958).

out such a requirement. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), the Court noted:

> A series of particular statutes grant jurisdiction without regard to the amount in controversy in virtually all areas that otherwise would fall under the general Federal question statute. Such special statutes cover: admiralty, maritime, and prize cases, 28 U.S.C. section 1333; bankruptcy matters and proceedings, 28 U.S.C. section 1334; review of orders of the Interstate Commerce Commission, 28 U.S.C. section 1336; cases arising under any Act of Congress regulating commerce, 28 U.S.C. section 1337; patent, copyright, and trademark cases, 28 U.S.C. section 1338; postal matters, 28 U.S.C. section 1339; internal revenue and custom duties actions, 28 U.S.C. section 1340; election disputes, 28 U.S.C. section 1344; cases in which the United States is a party, 28 U.S.C. sections 1345, 1346, 1347, 1348, 1349, 1358, and 1361; certain tort actions by aliens, 28 U.S.C. section 1350; actions on bonds executed under Federal law, 28 U.S.C. section 1352; cases involving Indian allotments, 28 U.S.C. section 1353; and injuries under Federal law, 28 U.S.C. section 1357.[38]

On the other hand, there are a significant number of situations involving "nonstatutory" review in which a plaintiff must still ground his action on section 1331 and, therefore, must establish that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs." In some of these cases the jurisdictional amount requirement cannot be met because it is impossible to place a monetary value on the right asserted by the plaintiff.[39]

In other cases, the plaintiff's claim that he is entitled to a Federal grant or benefit such as Federal employment [40] or welfare [41] may be assigned a monetary value, but the amount in controversy may be $10,000 or less.

The resulting denial to litigants of a Federal forum for Federal claims considered incapable of dollars and cents valuation or too small in monetary amount and not permitted to be aggregated has been described as "an unfortunate gap in the statutory jurisdiction of the Federal courts." [42]

Section 2 of S. 800 would end the requirement of 28 U.S.C. section 1331 that more than $10,000 be in controversy in order for a Federal court to have jurisdiction of a Federal question case brought against the United States, an agency thereof, or an officer or employee thereof in his official capacity.

Accordingly, no jurisdictional amount requirement would apply to cases against the Federal Government, a Federal agency, or any

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[38] 405 U.S. at p. 549.

[39] How can one value, for example, an individual's claim that he is entitled to remain free from continuous police surveillance, *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 100 (1965), or military service, *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968), or to distribute political leaflets, *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir. 1970), *cert. denied*, 400 U.S. 960 (1970)? *See also* cases cited in Wright, Miller and Cooper, 13 Federal Practice and Procedure, section 3561 (1975).

[40] *See e.g., Fischler* v. *McCarthy*, 177 F. Supp. 643 (S.D. N.Y. 1954), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954).

[41] *See, e.g., Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir. 1974), *cert. denied*, 419 U.S. 879 (1975).

[42] *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967).

official or employee where the plaintiff alleges that the official or employee has acted in his official capacity or under color of law.

Like section 1 of S. 800, however, the partial elimination of sovereign immunity, the grant of subject matter jurisdiction without a required jurisdictional amount would not affect other limitations on the availability or scope of judicial review of Federal questions, including, for example, lack of standing, ripeness, or exhaustion of administrative remedies.

The factors relevant to the question whether a Federal court should be available to a litigant seeking protection of a Federal right have little, if any, correlation with the minimum jurisdictional amount.

Thus, as Assistant Attorney General Scalia in his comment in behalf of the Justice Department concluded:

> . . . the existence of monetary damages in cases involving agency action is an erratic factor to begin with, not necessarily related to either the private or public importance of the issue involved . . . the 'amount in controversy' provision of section 1331 is seen to have a very limited and virtually irrational application, at least as applied to judicial review of administrative action. [43]

Instead, the important considerations include whether there is need for a specialized Federal tribunal or whether there are defects in the state judicial system that might substantially impair consideration of the plaintiff's claim. [44] These factors have special force in cases in which specific relief is sought against a Federal officer because state courts generally are powerless to restrain or direct a Federal officer's action which is taken under color of Federal law. [45] The denial of a Federal forum for lack of the jurisdictional amount may therefore be a denial of any remedy whatsoever. [46] Justice clearly requires elimination of this deficiency.

Impact on Federal caseload

According to leading authorities, elimination of the amount-in-controversy requirement in Federal question cases, even if it were also to be eliminated in strictly private litigation, will have no measurable impact on the caseload of the Federal courts. [47] S. 800, as amended, would only eliminate the statutory requirement in suits against the United States, its agencies, or officers or employees.

Presently, the jurisdictional amount requirement is applicable, where aggrieved private persons are seeking nonstatutory review of Federal administrative actions in suits brought against Federal officers or agencies. This category provides the only significant instances in

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[43] Scalia letter, exhibit C, below.

[44] *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law and Contemp. Prob. 216, 225–26 (1948).

[45] *See* Arnold, *The Power of State Courts to Enjoin Federal Officers,* 73 Yale L.J. 1385 (1964).

[46] "In *Fox* v. *Hillside Realty Corp.,* 79 F.Supp. 832 (D.-N.Y. 1948), a federal action challenging a rent increase allowed by federal officials was dismissed for lack of the jurisdictional amount. A subsequent suit in state court was unsuccessful because the state courts held that they lacked power to pass on the action of the federal officials. *Fox* v. *Hillside Realty Corp.,* 87 N.Y.S.2d 351 (1949) *aff'd.,* 95 N.Y.S.2d 598, 276 App.Div. 994 (1950)." Wright, Miller and Cooper, 13 Federal Practice and Procedure, section 3561, at p. 393, n. 21.

[47] *Id., C. Wright, Law of Federal Courts,* p. 107 (2d ed. 1970) ; 1970 Hearings at pp. 53–54, Wright, Miller and Cooper, 13 Federal Practice and Procedure, section 3561 (1975).

which the jurisdictional amount requirement of 28 U.S.C. section 1331 is an effective limitation, either because the right cannot be valued or it is worth less than $10,000 and there is no special statute applicable without an amount-in-controversy provision. [48] Yet even in this situation, the limitation can be circumvented if the plaintiff brings his action in the District of Columbia or if he can cast his action in the form of a mandamus proceeding under 28 U.S.C. section 1361, the Mandamus and Venue Act of 1962.

The resulting situation is hardly a logical or defensible one. In 1962 Congress, disturbed by the inability of litigants to obtain mandamus relief in local courts distributed around the country, conferred such jurisdiction on all district courts without regard to the amount in controversy. The more traditional exercise of injunctive or declaratory authority, however, remains subject to the requirement of a minimum jurisdictional amount whenever no special Federal question statute is available—except in the District of Columbia. The same arguments that supported the Mandamus and Venue Act of 1962—the expense and inconvenience of forcing litigants from all over the country to bring their claims to a District of Columbia court—support the elimination of the remaining anachronism in injunction suits against Federal officers: the jurisdictional amount in controversy.

The number of additional cases that will be brought in Federal courts if section 1331 is amended to eliminate the jurisdictional amount requirement is likely to be quite small. According to Professor Wright:

> There is no risk that ending the amount in controversy requirement for federal question cases would open the federal courts to unpredictable numbers of unknowable kinds of cases. The terrain is well marked. The cases affected are those in which federal action is challenged and in which state action is challenged on grounds that do not come within section 1343(3). These are important cases for which a federal forum is especially appropriate.[49]

Elimination of the amount in controversy is not likely in itself to increase even the number of suits against Federal officers since some courts are already adopting a very lax interpretation of the requirement in such cases.[50] But elimination of the requisite jurisdictional amount will eliminate a technical barrier to judicial relief which many courts are avoiding or circumventing altogether in order to avoid in-

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[48] The amounts-in-controversy requirement in this category of cases was reaffirmed in dictum in *Lynch* v. *Household Finance Corp.* 405 538, 547 (1972) ("in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction"). The significance of this dictum, however, was recently questioned in Earnest, the Jurisdictional Amount in Controversy in Suits to Enforce Federal Rights, 54 Texas L. Rev.; 545, 557 588 (1976). (Hereafter cited as "Earnest")

[49] 1970 Hearings at p. 259. More recently, Professor Wright has described as "rare and insignificant" some of the cases to which the amount requirement remains applicable. Thus, "a municipality cannot be sued under the civil rights provisions of 42 U.S.C.A. section 1983 and 28 U.S.C.A. section 1343(3) and thus a suit against a municipality on the basis of the Federal Constitution or laws must be brought under 28 U.S.C.A. section 1331 and more than $10,000 must be in controversy. *Calvin* v. *Conlisk*, 367 F.Supp. 476 (D. Ill. 1973). It remains an open question whether a suit challenging a state statute on the ground that it is inconsistent with a Federal statute may be brought without regard to amount in controversy under 28 U.S.C.A. section 1343(3). *Hagans* v. *Lavine*, 415 U.S. 528, 533 n. 5 (1974)." Wright, Miller and Cooper, 13 Federal Practice and Procedure, section 3561, at p. 392, n. 17 (1975).

[50] See Earnest, *supra* note 49; letter from Roger Cramton, May 24, 1976, 1976 Hearings.

justice.[51] Professor Davis noted in connection with the elimination of the sovereign immunity defense in equitable actions, "Congress should relieve our good judges from such an unnecessary dilemma." [52] It should enact S. 800 and thus eliminate the jurisdictional amount-in-controversy requirement in all Federal question cases where the suit is against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

As with the partial elimination of the sovereign immunity defense, the partial elimination of the jurisdictional amount requirement in Federal question cases is likely to result in a more efficient use of judicial resources, with courts and counsel no longer having to waste time and energy on the question of amounts in controversy.

Caseloads and efficiency aside, a larger issue remains. For as Professor Wright has written:

> We do nothing to encourage confidence in our judicial system or in the ability of persons with substantial grievances to obtain redress through lawful processes when we close the courthouse door to those who cannot produce $10,000 as a ticket of admission.[53]

C. PARTIES DEFENDANT

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, has given rise to numerous cases in which a plaintiff's claim has been dismissed because the wrong defendant was named or served.[54]

Nor is the current practice of naming the head of an agency as defendant always an accurate description of the actual parties involved in a dispute. Rather, this practice often leads to delay and technical deficiencies in suits for judicial review.[55]

The unsatisfactory state of the law of parties defendant has been recognized for some time and several attempts have been made by Congress to cure the deficiencies.[56]

Despite these attempts, problems persist involving parties defendant in actions for judicial review. In the committee's view the ends

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[51] *Id.* Such avoidance, however, abdicates a court's constitutional and statutory duties "to ensure that each case before it falls within the limited jurisdictional power of the Federal judiciary. Moreover, such evidence adds to the confusion surrounding the requisite, calling on the Congress rather jurisdictional amount, especially in the lower courts, and fosters arbitrary and haphazard application of jurisdictional standards." *Id.* at p. 585. *See also* Wright, Miller and Cooper, 13 Federal Practice and Procedure, section 3561, at pp. 395–96, calling on the Congress rather than the courts to fill in the "unfortunate gap in the statutory jurisdiction of the Federal courts."

[52] Davis letter, 1976 Hearings.

[53] 1970 Senate Hearings at p. 254.

[54] *See, e.g., Clegg* v. *Treasury Department,* et al.—— F. Supp. —— (D. Mass. 1976), 38 Pike and Fisher Ad. L. 2d 229 (March 16, 1976), (action against the Treasury Department and the Secret Service for allegedly failing to provide Secretary Service protection to plaintiff as a presidential candidate dismissed for lack of jurisdiction based in part on misjoinder and failure to name the correct parties defendant).

[55] See statement of Francis M. Gregory, Jr., vice chairman, Committee on Judicial Review, Section of Administrative Law, American Bar Association, 1976 Hearings.

[56] First, Congress in 1962 amended section 1391(e) of Title 28 in order to allow broadened venue and extra-territorial service of process in suits against Federal officers and thus to circumvent the formerly troublesome requirement that superior officers be joined as parties defendant. Second, Rule 25(d) of the Federal Rules of Civil Procedure was amended in 1961 to provide for the automatic substitution of successors in office. That rule also states that "any misnomer not affecting the substantial rights of the parties shall be disregarded" and that the officer may be "described as a party by his official title rather than by name." Third, Rule 15(c) of the Federal Rules was amended in 1966 to deal with the plaintiff's failure to name any appropriate officer or agency as defendant.

of justice are not served when government attorneys advance highly technical rules in order to prevent a determination on the merits of what may be just claims.

When an instrumentality of the United States is the real defendant, the plaintiff should have the option of naming as defendant the United States, the agency by its official title, appropriate officers, or any combination of them. The outcome of the case should not turn on the plaintiff's choice. S. 800 accomplishes this objective by including a new sentence between the first and last sentences of section 703 of title 5 to provide the plaintiff with this option in judicial review actions, providing no special statutory review proceeding is applicable. The new sentence would read:

> "If no special statutory review proceeding is applicable the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer."

The first clause of this sentence is intended to preserve specific provisions regarding the naming of parties which have been or may in the future be established by Congress. Such provisions may be part of a fully developed review procedure or may be provisions which are more narrowly directed only to the required naming of the particular defendant where such requirement has intended consequences such as the restriction of venue or service of process. The example previously cited in this report is 16 U.S.C. 831c(b), a statutory provision which provides that litigation involving actions of the Tennessee Valley Authority be brought against that agency only in its own name. *National Resources Council* v. *Tennessee Valley Authority*, 459 F.2d 255 (2d Cir. 1972).

Joinder of Third Persons

A related problem concerns joinder of third persons as parties defendant. When section 1391(e) of title 28, which governs venue of actions against Federal officers and agencies, was enacted in 1962, its broadened venue and extra-territorial service of process were limited to judicial review actions "in which *each* defendant is an officer or employee of the United States or an agency thereof." (emphasis added.)

This language can be interpreted to prevent a plaintiff from joining non-Federal third persons as defendants in actions under section 1391(e). For example, in *Chase Savings & Loan Association* v. *Federal Home Loan Bank Board*, 269 F. Supp. 965 (E.D. Pa. 1967), the court dismissed an action which had joined the Federal board and a local bank on the ground of improper venue. The court in *Town of East Haven* v. *Eastern Airlines*, 282 F. Supp. 507 (D. Conn. 1968), also dismissed an action on the same grounds but not before criticizing the requirements of section 1391(e).

More recent cases, cognizant of the awkwardness and inconvenience of the section, have held to the contrary. In *Green* v. *Laird*, 357 F. Supp. 227 (N.D. Ill. 1973), for example, the court held that an interpretation of section 1391(e) which excludes non-Federal defendants is inconsistent with the congressional intent.[57]

[57] *See also Macias* v. *Finch*, 324 F.Supp. 1252, 1254–55 (N.D. Cal. 1970); *People of Saipan* v. *Dept. of the Interior*, 356 F.Supp. 645, 651 (D. Hawaii (1973), *modified on other grounds*, 502 F.2d 90 (9th Cir. 1974).

There is no functional justification for this limitation on joinder. Moreover, it prevents relief in some situations in which the Federal courts can make a special contribution.[58]

Section 3 of S. 800 amends 1391(e) of title 28 to make it clear that a plaintiff may use the section's provisions for broad venue and extra-territorial service of process against Government defendants, despite the presence in the action of a non-Federal defendant.

The amendment substitutes the word "a" for the word "each," and adds a new sentence permitting joinder of non-Federal defendants who can be served in accordance with normal rules governing service of process. Other objections to such joinder, stemming from the discretion vested in the trial judge under the Federal Rules of Civil Procedure to control the dimensions of the law suit and to protect particular parties, would be unaffected.

The Department of Justice objected that section 3, as introduced, "would permit any plaintiff to obtain venue against any private defendant by simply joining as a party to the action a Federal official over whom venue may be obtained under 28 U.S.C. section 1391(e)." [59] To avoid any hardship or unfair disadvantage to private defendants that might result from subjecting them to plaintiff's broadened choice of venue under section 1391(e) as amended, the Senate amended the pertinent sentence of section 3 of S. 800 to read as follows:

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure *and with such other venue requirements as would be applicable if the United States or one of its officers, employees or agencies were not a party.* (emphasis added.)

In effect, this will mean that a private defendant can only be sued in a venue where he could have been sued if the Government had not been a party. As a practical matter, it will usually mean that the plaintiff will have to bring suit in the district where the defendant resides rather than in his own district.

Conclusion

The subjects of this bill are long overdue for reform. S. 800 contains limited, modest, and reasonable reforms in a carefully drafted bill.

Its principal provision, the partial elimination of sovereign immunity as a defense to actions for equitable relief, has the support of the most eminent scholars and practitioners of administrative law, as well as the Judicial Conference of the United States and the Department of Justice.

The partial elimination of sovereign immunity will facilitate non-statutory judicial review of Federal administrative action without

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[58] "In many public land controversies, for example, three parties are involved—the official, a successful applicant, and an unsuccessful one. Effective relief cannot be obtained in an action in which the United States or its officer is not involved; but if the Government is named as defendant, 1391(e) prevents the joinder of the other private person as a defendant, and that person cannot be joined as a plaintiff because his interest is adverse to that of the plaintiff. Another common type of situation in which the limitation is troublesome is that in which the specific relief is sought against Federal and state officers who are cooperating in a regulatory or enforcement program.

"There are no sound reasons why the general principle that control party joinder in Federal courts should not be applicable in these situations." Statement of Roger Cranton, 1970 Senate Hearings at p. 39.

[59] Scalia letter, exhibit C, below.

affecting the existing pattern of statutory remedies, without disturbing the established law of judicial review, without exposing the Government to new liability for money damages, and without upsetting congressional judgments that a particular remedy in a given situation should be the exclusive remedy.

Like sovereign immunity, other anachronisms in the law of judicial review such as the jurisdictional amount in controversy and the naming and joinder of parties defendant have outlived their usefulness, continue to cause confusion and injustice, and are overdue for elimination or reform.

The adoption of S. 800, therefore, will make a substantial contribution to both administrative justice and judicial efficiency by promoting rationality in a complex and intricate field of Federal law. By removing artificial and outmoded barriers to judicial review of official action, S. 800 will also help restore public confidence in the responsiveness and accountability of the Federal Government.

For these reasons, the committee recommends that the bill be considered favorably.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of a relevant statute, is entitled to judicial review thereof. *An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States, provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief or any other appropriate legal or equitable grounds; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.*

5 U.S.C. 703

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable

form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. *If no special statutory review proceding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.* Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 U.S.C. 1331

§ 1331. Federal questions

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States[.] *except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.*

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. 1391(e)

(e) A civil action in which [each] *a* defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, *or the United States*, may, except as otherwise provided by law, be brought in any judicial district in which[:] (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. *Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees or agencies were not a party.*

STATEMENTS UNDER CLAUSE 2(1)(2)(B), CLAUSE 2(1)(3) AND CLAUSE 2(1)(4) OF RULE XI AND CLAUSE 7(a)(1) OF RULE XIII OF THE HOUSE OF REPRESENTATIVES

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On September 21, 1976, the Full Committee on the Judiciary approved the bill S. 800 by a record vote of 26 ayes and one no.

COST

The bill S. 800 is procedural in nature and clarifies the jurisdiction of Federal courts. The limited expansion of jurisdiction should not require additional appropriation of funds to either the judiciary or the agencies.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility with reference to administrative law and procedure in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII(7)(a)(1), the bill merely provides for amendments to procedural provisions in titles 5 and 28 of the U.S. Code relating to judicial review of administrative action. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(1)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

No estimate or comparison was received from the Director of the Congressional Budget Office.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(3))

In compliance with clause 2(1)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

EXHIBITS

EXHIBIT A

Recommendations of the Administrative Conference of the United States

Recommendation No. 68–7—Elimination of Jurisdictional Amount Requirement in Judicial Review

Title 28 of the United States Code should be amended to eliminate any requirement of a minimum jurisdiction amount before United States district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law. This amendment is not to affect other limitations on the availability or scope of judicial review of Federal administrative action.

(*Adopted December 10–11, 1968*)

Recommendation No. 69–1—Statutory Reform of the Sovereign Immunity Doctrine

The technical legal defense of sovereign immunity, which the Government may still use in some instances to block suits against it by its citizens regardless of the merit of their claims, has become in large measure unacceptable. Many years ago the United States by statute accepted legal responsibility for contractual liability and for various types of misconduct by its employees. The "doctrine of sovereign immunity" should be similarly limited where it blocks the right of citizens to challenge in courts the legality of acts of governmental administrators. To this end the Administrative Procedure Act should be amended.

RECOMMENDATION

1. Section 702 of Title 5, United States Code (formerly section 10(a) of the Administrative Procedure Act), should be amended by adding the following at the end of the section:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United

States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 703 of Title 5, United States Code (formerly section 10(b) of the Administrative Procedure Act), should be amended by adding the following sentence after the first full sentence:

If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

(*Adopted October 21–22, 1969*)

Recommendation No. 70–1—Parties Defendant

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

Recommendation

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules or Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

2. Congress should enact legislation:

(a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United

States, the agency by its official title, the appropriate officer, or any combination of them.

(b) Amending section 1391 (e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

(c) Amending section 1391 (e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which nonfederal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

(*Adopted June 2–3, 1970*)

EXHIBIT B

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., November 3, 1070.

Hon. EDWARD M. KENNEDY,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: This is in further reference to your letter of May 1, 1970, to the Chief Justice requesting the views of the Judicial Conference on S. 3568,* relating to judicial review of administrative action and containing sections relating to venue and parties defendant.

The Judicial Conference of the United States met on October 29 and 30, 1970, and voted its approval in principle of S. 3568 and specifically endorsed Section 2 of the bill relating to the jurisdictional amount requirement and Section 3 providing for suit in the same judicial districts in which the federal official or agency may be sued.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

EXHIBIT C

DEPARTMENT OF JUSTICE,
Washington, D.C., May 10, 1976.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request at my testimony before your Subcommittee on April 28, 1976 that I submit the written views of the Department of Justice on S. 800, a bill "[t]o amend chapter 7, title 5, United States Code, with respect to procedure for judicial review of certain administrative agency action, and for other purposes."

SECTION 1—SOVEREIGN IMMUNITY

Section 1 of S. 800 would amend 5 U.S.C. 702 to eliminate the defense of sovereign immunity of the United States in actions in United States courts seeking relief other than money damages. The Department has in the past opposed such a change.

*Reintroduced on Feb. 22, 1975 as S. 800. *See* 121 Cong. Rec. 2416 (daily ed.).

In light of the tenacious and well reasoned support of this proposal by such knowledgeable and responsible organizations as the Administrative Conference of the United States and the American Bar Association, we have reconsidered that opposition, and are now prepared to endorse the concept in principle, and to support the text of S. 800, with two small but important changes and a number of caveats concerning its proper interpretation. The arguments in favor of this aspect of S. 800 have been described in testimony presented by others before your Subcommittee. Foremost among them, in my view, is the failure of the criteria for sovereign immunity, as they have been expressed in a long and bewildering series of Supreme Court decisions, to bear any necessary relationship to the real factors which should determine when the Government requires special protection which ordinary litigants would not be accorded.

The main argument against S. 800 is one that can be made against most statutes which seek to make a change in encrusted principles of the common law: the difficulty of obtaining complete assurance that no untoward result will be produced. The Department of Justice has been unable to identify any, assuming that the modifications and interpretations proposed in this letter are accepted. We are sure, however, that the Committee will give careful consideration to the submissions of other agencies on this point with respect to their particular areas of activity.

It should also be pointed out that the status quo itself is not without uncertainty. No one can read the significant Supreme Court cases on sovereign immunity, from *United States* v. *Lee*, 106 U.S. 196 (1882) to *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), *Dugan* v. *Rank*, 372 U.S. 609 (1963) and *Hawaii* v. *Gordon*, 373 U.S. 57 (1963) (per curiam), without concluding that the field is a mass of confusion; and if he ventures beyond that to attempt some reconciliation of the courts of appeals decisions, he will find confusion compounded. Accepting the elimination of the doctrine of sovereign immunity is not, then, a case of exchanging the certain for the uncertain, or the known for the unknown.

Indeed, if the present bill is properly understood and properly applied by the courts, it is likely to produce a more stable and predictable system of immunity from suit than the present doctrine of sovereign immunity can ever attain—because it will be a system directly and honestly based upon relevant governmental factors rather than upon a medieval concept whose real vitality is long since gone and which we have tried vainly to convert to rational modern use. It is not the intent of the Department nor, as I understand it, the intent of the drafters of this bill, that all of the cases which have heretofore been disposed of on the basis of sovereign immunity would in the future be entertained and adjudicated by the courts. To the contrary, one of the very premises of the proposal is the fact that many (indeed, I would say most) of the cases disposed of on the basis of sovereign immunity could have been decided the same way on other legal grounds, such as: lack of standing; lack of ripeness; availability of an alternative remedy in another court; express or implied statutory preclusion of judicial review; commission of the matter by law to agency discretion; privileged nature of the defendant's conduct; fail-

ure to exhaust administrative remedies; discretionary power to refuse equitable relief; [1] and the "political question" doctrine.[2] As stated in the Administrative Conference Report:

> The essential and sound policy underlying sovereign immunity—that courts should not engage in indiscriminate interference with governmental programs—is not abandoned merely because an artificial and outmoded doctrine is abolished. The same basic policy is inherent in the body of law that governs the availability and scope of judicial review. The doctrine of sovereign immunity is unnecessary to prevent courts from (a) entering fields which the Constitution or Congress has deegated to the executive, and (b) displacing executive or administrative judgment. (1 *ACUS Reports* at 225.)

In addition to the common law doctrines which afford certain governmental processes needed protection, it is also an important factor in our support for the bill that the waiver of immunity, since it is made via § 702, will only applpy to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act, including that which renders review unavailable "to the extent that—(1) statutes preclude judicial review, or, (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). They also include the requirement that "the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter," where such a proceeding exists and is not inadequate. 5 U.S.C. § 703. These features were considered of great importance by the Administrative Conference Committee which originally drafted this legislative proposal, and they are important elements of the Department's support for the bill.

In one respect, the proposed § 702 differs from the version recommended by the Administrative Conference, and we believe the change is undesirable. Clause (2) of the last sentence, as proposed by the Administrative Conference, would have provided that nothing in the legislation confers authority to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." This has been changed to read: "if any other statute granting consent to suit *for money damages* forbids the relief which is sought." (emphasis added). The underscored phrase and the elimination of the phrase "expressly or impliedly" could be interpreted to limit the disclaimer in such a fashion as to raise serious questions concerning the scope of the new reviewability which would be created. We see no reason why a congressional intent to preclude other remedies should be honored only with respect to statutes for money damages, and otherwise ignored. Nor do we believe it should be left in any doubt that the requisite intent need not be express (which, in a prior system which assumed the existence of sovereign immunity, would be extremely rare) but can be found from all the circumstances normally available to assess legislative will. Because existing statutes have been

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[1] See the cases on each of these points cited in the Report of the Commission on Judicial Review of the Administrative Conference of the United States, 1 *Recommendations and Reports of the Administrative Conference* (hereinafter "ACUS Reports") 191, 222–23.
[2] See, *e.g.*, *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948).

enacted against the backdrop of sovereign immunity, this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief. It would be unwise to upset these specific determinations by a general provision of this sort, without considering them individually, or even knowing precisely what they are. In the many areas where Congress has not acted, however, and when its action is not addressed to the type of grievance which the plaintiff seeks to assert, suit would be allowed. The Department of Justice strongly urges that the Administrative Conference's original and well considered recommendation on this point be reinstated.

Our second disagreement with the text of section 1 of the bill relates to the next to the last sentence of the revised § 702, which provides that "the United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States." This was part of the original Administrative Conference proposal. Its purpose was to eliminate the "technicalities of the law of parties defendant" and to assure the "binding effect of judgments" against the United States. (See 1 *ACUS Reports* 220–22.)

We have no quarrel with these objectives, nor with the text of the provision insofar as it provides for the initial naming of the United States. The provision for the entering of a judgment or decree against the United States, however, is inadvisable without some modification. In order to assure that the binding effect of a judgment will not lapse with the departure of the Federal officer who happens to have been named, it seems to us unnecessary to leave to the Justice Department—or perhaps to the Government as a whole—the task of deciding what individual has personal responsibility (presumably under pain of contempt) for compliance with a court's mandatory decree. Leaving the matter thus unspecified is either unfair to the individual who may be responsible or else destructive of the enforceability of the decree. We suggest that all the values sought to be achieved by this provision can be preserved, and the foregoing difficulty eliminated, by adding to the sentence in question the following proviso:

> provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.

In connection with this provision, I may also note our understanding that the ability to name the United States in the initial pleading does not alter the degree of specificity with which the plaintiff must plead and establish his case. For example, where the plaintiff knows that particular officers of a particular agency caused the wrong alleged, he cannot merely plead that it was caused by unspecified officers of the United States, leaving it to the Department of Justice to circularize the entire Government in order to respond to the complaint. Such a pleading would be subject to a motion for more definite statement under Rule 12(e) of the Federal Rules of Civil Procedure.

With the revisions suggested above, the Department supports enactment of section 1 of S. 800.

SECTION 2—AMOUNT IN CONTROVERSY

Section 2 of S. 800 would amend 28 U.S.C. section 1331 to eliminate the requirement that there be at least $10,000 in controversy, and thus provide federal court jurisdiction over all civil cases raising "federal questions" regardless of the monetary amount involved.

The Department of Justice has in the past supported removal of the "amount in controversy" requirement in cases alleging unconstitutional action by federal agents. The Administrative Conference of the United States has recommended the somewhat broader approach of eliminating the requirement with respect to cases in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States, or an agency thereof, "acting under color of Federal law." Conference Recommendation 68–7. Virtually all of the additional ground covered by the Conference proposal would be encompassed by existing law if section 10 of the APA, 5 U.S.C. §§ 701–03, were established to be an independent grant of jurisdiction. This is presently the law of the District of Columbia Circuit, *Pickus* v. *United States Board of Parole*, 507 F. 2d 1107 (D.C. Cir. 1974), though it is not universally accepted. Moreover, the jurisdictional amount requirement can be avoided if suit can be cast in the form of an action "in the nature of mandamus," so as to qualify under the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. *See* Report of the Committee on Judicial Review of the Administrative Conference, 1 *ACUS Reports* 170, 176–77. When these means of avoiding the requirement are added to the fact that the existence of monetary damage in cases involving agency action is an erratic factor to begin with, not necessarily related to either the private or public importance of the issue involved, the "amount in controversy" provision of § 1331 is seen to have a very limited and virtually irrational application, at least as applied to judicial review of administrative action. The Department therefore supports the Administrative Conference recommendation.

The amendment contained in S. 800, however, would go beyond the Conference proposal, and would remove the "amount in controversy" requirement not merely in suits for review of federal agency action but in all federal question cases. We do not know the volume and the character of cases which this further extension would add to federal court dockets. The Administrative Conference Committee report of course did not address the point, and we know of no other study which does. It is conceivable that the small volume of such cases, or their relatively high importance, renders the extension unobjectionable. If the Subcommittee has reliable information on the point, we will be pleased to examine it and provide our further views. Absent such data, however, we think it advisable to adhere to the carefully considered Administrative Conference recommendation, which would limit section 2 to the important category of suits seeking review of agency action.

SECTION 3—VENUE

Section 3 of S. 800 would amend 28 U.S.C. § 1391(e) to permit additional persons to be joined as parties in actions against the United

States, its agencies, officers or employees, "without regard to other venue requirements." Presently, 28 U.S.C. § 1391(e), which grants venue not merely in the defendant's district but in the plaintiff's district, whether the cause of action arose or where real property which it involves is situated, applies to a civil action in which "each defendant" is an officer or employee of the United States or any agency thereof. The amendment proposed would make the presence of a single federal defendant sufficient.

While the question must be regarded as still open, the limitation on joinder set forth in § 1391(e) has been held by some courts to apply only to those individuals as to whom that section itself is the sole basis of venue. That is, additional defendants may be joined so long as an independent basis of venue with respect to them exists. *See National Resources Defense Council, Inc.* v. *Tennessee Valley Authority*, 459 F. 2d 255, 257 n. 3 (2d Cir. 1972). If the effect of the present proposal were merely to codify this interpretation of § 1391(e), the Department would support it. However, the amendment as written goes much further. It would permit any plaintiff to obtain venue against any private defendant by simply joining as a party to the action a federal official over whom venue may be obtained under 28 U.S.C. § 1391(e). The Department sees no reason why the facilitation of suits against the Government should lead to the imposition of hardships against non-Government defendants which the ordinary venue rules are designed to avoid. *See Town of East Haven* v. *Eastern Airlines*, 282 F. Supp. 507, 510–11 (D. Conn. 1968). We may note, incidentally, that the portion of the Administrative Conference Committee report which was the origin of this proposal did not address the point we have here raised, and indeed in all except its last sentence discussed the problem as though the only issue were permitting the joinder of persons as to whom independent grounds of venue existed. *See* 1 *ACUS Reports* 431–32.

The Department's objection would be met if the final phrase of section 3, "without regard to other venue requirements," were replaced by: "and with such other venue requirements as would be applicable if the United States or one of its officers, employees or agencies were not a party."

For the reasons stated above, the Department of Justice recommends enactment of this legislation with the suggested amendments.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ANTONIN SCALIA,
Assistant Attorney General, Office of Legal Counsel.

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